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No. 75-370

In the Supreme Court of the United States

OCTOBER TERM, 1975

GUS JOHN SKARTSIVAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entrapped as a matter of law and that the government should have been required to call an informant as a prosecution witness, even though the informant was available to the defense.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of two counts of having distributed heroin, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to concurrent terms of five years' imprisonment and a special parole term of three years. The court of appeals affirmed without opinion (Pet. App. A 1).

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[1]This was petitioner's third trial. Initially he pled guilty to count one of the indictment, but the district court permitted him to withdraw the plea upon his assertion that he could produce a witness who would testify that he was coerced into selling heroin. Thereafter, in February 1974, petitioner was tried before a jury and convicted on both counts. That conviction was vacated in May 1974 on the ground of ineffective assistance of counsel. A second trial in June 1974 ended in jury disagreement.

In early September 1972 in Detroit, Michigan, Agent Frank Catalogna of the Drug Enforcement Administration ("DEA") began investigating petitioner on the basis of information furnished by Frankie Mays, a paid informant (Tr. 10, 86, 109-111, 144-147). Agent Catalogna instructed Mays to tell petitioner that he knew of a prospective purchaser of narcotics (Tr. 11, 110). On the morning of September 26, 1972, DEA Agent Melvin Smith, who was to pose as the buyer, drove to Mays' home to arrange to purchase heroin from petitioner (Tr. 10-12, 88).

At about 1:00 p.m., Mays engaged in a telephone conversation in Smith's presence during which he asked the other party to sell one ounce of heroin. Mays agreed to pay $1,000 for the heroin and to meet the other person at 1:30 p.m. on the corner of Wyoming and Six Mile Streets in Detroit (Tr. 12-14). Smith and Mays drove to the meeting place and met petitioner, who sold Agent Smith a quantity of heroin for $1,000 (Tr. 14, 16-17, 88-89).

Petitioner noticed that Agent Smith had more money remaining and offered to sell an additional quantity of heroin which petitioner said was to have been the subject of another transaction which had fallen through. Agent Smith then purchased that quantity of heroin for $200. Petitioner also told Smith that he could arrange future heroin transactions (Tr. 17-18, 20-21, 84).

On October 4, 1972, Agent Smith telephoned petitioner and said that he wished to buy some heroin immediately (Tr. 67; Tapes 1-2).[2] Shortly thereafter petitioner called

[2]"Tapes" refer to the verbatim transcript of the telephone conversations between Agent Smith and petitioner on October 4, 1972, which were recorded.

Smith back and inquired how much heroin Smith wanted. Smith said one ounce, but petitioner urged him to buy two, and Agent Smith agreed to the larger amount (Tr. 29-32, 36; Tapes 1-3). Petitioner telephoned Smith three subsequent times that afternoon; during those conversations petitioner and Agent Smith agreed on the purchase price and the time and place of the transaction; they also agreed that the quality of the heroin would be better than that sold by petitioner to Smith on September 26 (Tr. 35-38; Tapes 4-6).

Following those conversations, Smith met petitioner at the corner of Wyoming and Six Mile Streets and completed the transaction (Tr. 39-40). Smith asked petitioner to name his supplier, but petitioner declined to provide this information on the ground that it would deprive him of his status as middleman (Tr. 41). Petitioner told Agent Smith to call him if he wanted to buy more narcotics (Tr. 41). Petitioner was subsequently arrested.

1. Petitioner's contention that he was entrapped is unfounded since, as the record demonstrates, petitioner was predisposed to sell heroin on both occasions just recounted. See *United States* v. *Russell*, 411 U.S. 423, 433.

Petitioner proposes, however, that this Court adopt a new rule[3] in entrapment cases requiring the government to

[3]Contrary to petitioner's assertion (Pet. 14-15), no circuit now follows such a rule. *Henderson* v. *United States*, 261 F.2d 909 (C.A. 5), suggested simply that entrapment as a matter of law was proved by the government's evidence alone, even without defendant's testimony; nothing whatever was said about a "reasonable suspicion" test. That such a test is not followed in the Ninth Circuit is shown by *Young* v. *United States*, 286 F.2d 13, 15, certiorari denied, 366 U.S. 970. Nor does the Sixth Circuit have such a rule, see *United States* v. *Ambrose*, 483 F.2d 742, 752. *Morei* v. *United States*, 127 F.2d 827 (C.A. 6), relied upon by petitioner, held that entrapment was no defense if the criminal plan originated with the

prove that prior to affording the defendant an opportunity to commit a crime it had a "reasonable suspicion" that he would do so. Such a rule is unwarranted, since it would add nothing to the ability of the "otherwise innocent" (*Sorrells* v. *United States,* 287 U.S. 435, 448) to demonstrate their lack of predisposition, but would, rather, focus on the conduct of the government, which this Court has held is not the intended purpose of the entrapment defense. *United States* v. *Russell, supra,* 411 U.S. at 435. See *United States* v. *Williams,* 487 F.2d 210, 211, n.1 (C.A. 9), certiorari denied, 416 U.S. 958.

2. At both of petitioner's previous trials in this case he had called the informant Mays to testify on his behalf. At this trial he requested the district court to instruct the government to call Mays as a prosecution witness. The district court refused to do so (Tr. 141), whereupon petitioner elected not to call Mays and rested his defense.

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defendant *or* if the government agents had a reasonable suspicion that the defendant was engaged or about to be engaged in crime (127 F.2d at 833). *Morales* v. *United States,* 260 F.2d 939 (C.A. 6), simply took the defendant's prior lack of criminal conduct into account in determining that entrapment as a matter of law had been made out.

Neither *United States* v. *Fox,* 437 F.2d 733 (C.A. 7), certiorari denied *sub nom. Gill* v. *United States,* 402 U.S. 1011, nor *Lunsford* v. *United States,* 200 F.2d 237 (C.A. 10), holds that the government's failure to prove the existence of a "reasonable suspicion" is fatal when the entrapment defense is asserted. Rather, that issue was not raised in those cases, which hold only that the entrapment offense could not be successfully raised where the officers had reasonable suspicion to believe that the defendant might commit an offense.

Petitioner claims that Mays' testimony would have been exculpatory as to him and that therefore it was error for the district court not to order the government to call Mays as a government witness. But the government is under no obligation to call an informant as a witness, especially where, as here, the informant's testimony is not needed to prove an essential element of the government's case. See, *e.g., United States* v. *Tatum,* 496 F.2d 1282, 1284 (C.A. 5); *United States* v. *Craig,* 477 F.2d 129, 131 (C.A. 6). Petitioner knew that Mays was available to testify and what his testimony was likely to be; if he wished the jury to hear Mays' testimony he should have called him as his own witness. See *United States* v. *Key,* 371 F.2d 421, 423 (C.A. 6), certiorari denied, 386 U.S. 982; *Cohen* v. *United States,* 363 F.2d 321, 328 (C.A. 5), certiorari denied, 385 U.S. 957; *United States* v. *Miguel,* 340 F.2d 812, 815 (C.A. 2), certiorari denied, 382 U.S. 859; *Cenedella* v. *United States,* 224 F.2d 778, 783 (C.A. 1), certiorari denied, 350 U.S. 901.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[4]As the court of appeals noted (Pet. App. A 1), petitioner's reliance on *United States* v. *Bryant,* 461 F.2d 912 (C.A. 6), is misplaced. *Bryant* requires than an informant be called as a prosecution witness only where the government had suppressed evidence potentially favorable to the accused. 461 F.2d at 916. No such claim of suppression is made in this case.

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